89-1221

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

TERRANCE MOORE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

WAYNE COUNTY PROSECUTOR'S OFFICE

TIMOTHY A. BAUGHMAN*
Chief of the Criminal Division
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

* Counsel of Record

QUESTION PRESENTED

PARTICULARLY IN LIGHT OF THE COURT'S GRANT OF CERTIORARI IN HORTON V CALIFORNIA, NO. 88-7164, SHOULD CERTIORARI BE GRANTED ON THE FOLLOWING QUESTIONS:

HAVING NEVER COMMANDED A MAJORITY OF THE UNITED STATES SUPREME COURT, AND HAVING BEEN SUBJECTED TO QUESTION BY THAT COURT AND CRITICISM BY SCHOLARS, SHOULD THE INADVERTENCE "REQUIREMENT" OF THE PLAIN VIEW DOCTRINE BE FOLLOWED BY THIS COURT?

IF THE INADVERTENCE RULE SHOULD BE FOLLOWED, DOES IT APPLY TO CONTRABAND, AS JUSTICE STEWART IN COOLIDGE EXCLUDED CONTRABAND, STOLEN PROPERTY, AND ITEMS "DANGEROUS IN THEMSELVES" FROM THE INADVERTENCE REQUIREMENT?

IF THE INADVERTENCE REQUIREMENT SHOULD BE FOLLOWED, AND IF IT APPLIES TO CONTRABAND, HOW SHOULD IT BE DEFINED?

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PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of Research, Training and Appeals, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the

State of Michigan entered in the above-entitled cause on June 15, 1989, leave to appeal denied by the Michigan Supreme Court December 28, 1989, (three justices dissenting).

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix B. The Order of the Michigan Supreme Court is unreported at present and is appended as Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on June 15, 1989. The judgment of the Michigan Supreme

Court was entered on December 28, 1989. The jurisdiction of this Court is invoked under 28 USC (1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant was charged with possession with intent to deliver over 650 grams (i.e. 1000 grams) of cocaine. Upon stipulation of the parties, an evidentiary hearing was held and the following revealed.

Shortly before 11:00 pm on Monday, September 10, 1987, a police radio dispatch directed a scout car to 17187 Westphalia for shots fired in a known dope house, with an M-16 rifle reported as having been seen. The run was directed to car 9-82, but was generally broadcast, and monitored by car 9-25, which responded. No officers had any prior knowledge regarding the house in question.

As unit 9-25 arrived the officers saw

several uniform units arriving at about the same time. As the uniform officers approached the front door, the three plain clothes officers from unit 9-25 went to the rear of the house to secure the scene. It was their intent to ensure that no one escaped through the back door until the shooting report could be investigated.

Officer Mitchell went around one side of the house while Officer LaRose went to the other side. Mitchell jumped a fence to get into the yard, and took up a vantage point in the yard where he could see the back door. At the same time, LaRose went up the driveway adjacent to the house. From a position on the driveway he heard activity and movement in the house, and alerted his two partners. He then proceeded along a walkway to the back door.

Upon hearing LaRose call to them, Mitchell and the third officer, Soranno, joined LaRose at the back door, walking right up to the doorway (there was no porch, but a cement walkway). There were no signs or notices prohibiting the general public from approaching the residence from the rear.

Throughout the time the officers were getting in position by the back door, they heard the uniform officers banging at the front door. As the uniform officers stood at the front door announcing their presence and purpose, the plainclothes officers at the back looked into the house through the back door window. It was not necessary for them to move anything to see into the house, and they had a clear view of the interior through the window.

As the officers stood by the back

door, they saw defendant go toward a stairway leading to the basement, carrying a distinctively wrapped object with him as he went down the basement. Based upon the officers' prior experience, they recognized the object as a kilo of cocaine, wrapped for overseas shipment. These three officers all testified that just prior to this incident, they had been involved in the seizure of eight kilos of cocaine, all packaged in the same distinctive manner as that object carried by defendant Moore. The officers indicated they were aware of the package's nature as contraband immediately upon seeing it through the window.

Remaining by the door, the officers saw defendant come back up from the basement, and he no longer had the package. He went through the house

toward the front door. As he left their sight, they went to the front door, and observed the defendant open the front door and speak with the uniform officers.

The plainclothes officers noted what appeared to be bullet holes in a window and the screen covering that window, the window being just beside the front door, and the holes clearly apparent from the front of the house. No broken glass was seen.

When defendant answered the door, he denied that anyone had been shot. He invited the officers into the house to see that there had not been any shooting, but did not expressly consent to a search of the **entire** premises. He never gave express permission for the officers to go into the basement.

After the officers entered the house, car 9-82 arrived, and the two uniformed officers from that car joined in the

search. Officer Kiss went up a stairway to a second floor where he discovered an M-16 packing crate, but no rifle. After a brief search for possible shooting victims, Kiss returned to the first floor.

Officer LaRose testified that as he entered the front door he came into a combination livingroom-diningroom area, and noticed that the door to an adjoining bedroom was wide open. Looking into the bedroom he immediately noticed a handgun and spent casing lying on the floor, went into the bedroom, and seized the weapon, observing also that the serial number had been defaced. Officer Mitchell upon entry observed bullet holes in the wall. As officer LaRose went to the bedroom Mitchell went directly to the basement. He testified that while his primary purpose was to search for

shooting victims, he was also aware of the fact that defendant had taken cocaine into the basement, and believed it was still there. Officer Mitchell made a visual inspection of the basement by use of his flashlight--he opened no drawers or closed containers of any type, limiting his search to open areas. He shined his flashlight into the rafters and there noticed the distinctively wrapped kilo of cocaine. He did not have to move the package in any way to determine its nature as contraband.

Upon making the discovery of the cocaine, Mitchell returned to the first floor and reported his findings to LaRose, and both officers went back into the basement, Mitchell pointing out the cocaine to LaRose. The officers radioed for a supervisor, and showed her the cocaine in the rafters.

A search warrant was then obtained to search the premises and seize the cocaine. One inconsistency appeared in accounts of the event (which Petitioner submits is immaterial to the legality of the discovery and seizure of the contraband): while the testimony of all other witnesses was that the cocaine was never removed from the rafters until after the search warrant was obtained, officer Kiss testified he saw it lying on the dining room table prior to that time.

The trial judge suppressed and dismissed. He found that the observations through the back window violated the Fourth Amendment, that the radio run and observations of bullet holes did not create exigent circumstances to allow an immediate search for a possible victim or victims, and that when the officer shined his

flashlight up to the rafters in the basement he was not looking for a shooting victim but looking for the cocaine package he had earlier observed. The discovery of the cocaine being improper, held the court, its seizure pursuant to warrant reciting the improper observations was also improper, and the evidence was suppressed and the case dismissed.

On appeal by the People, the Michigan Court of Appeals affirmed the suppression and dismissal, but for somewhat different reasons. That court reached the following conclusions:

> 1)The officers presence at the back door was <u>justified</u>, and thus the initial discovery of the cocaine was "also proper as it was observed in plain view" (slip op at 3).
>
> 2)The police were <u>properly</u> in the defendant's house to search for possible shooting victims.

3)The search of the basement was not only for a possible victim, but indeed the officer who discovered the cocaine testified that "he fully expected the cocaine to be in the basement, and that his decision to search was at least partially motivated by a desire to locate the cocaine" (slip op at 3).

4)The shining of a flashlight into the basement rafters constituted a search ("By shining his flashlight into the rafters, the officer was clearly not exploring the basement for a shooting victim, but was searching for cocaine instead", emphasis supplied, slip op at 3).

5)The plain view doctrine requires inadvertence, and the discovery of the cocaine in this case was not, in the view of the court, "inadvertent" (slip op at 3).

6)Finally, the basement "search" for cocaine (as opposed to the basement search for a possible shooting victim) could not be justified by exigent circumstances.

The Michigan Supreme Court denied leave, the Petitioner seeks review of this important question by this Court.

REASONS FOR GRANTING THE WRIT

As indicated in the Statement of the Case, the Michigan Court of Appeals, disagreeing with the trial court, found that the officers were properly at the back door of the premises, and thus that their initial observation of defendant carrying the cocaine into the basement was proper, "as it was observed in plain view" (slip op at 3). The court also held, contrary to the trial court, that the police were properly in the home to look for possible shooting victims.

However, the court held that because the police were searching the basement not solely for a shooting victim, but also had knowledge that the cocaine was in the basement, the discovery of the cocaine in the basement was not proper under the plain view doctrine because not inadvertent (the court also stating that

shining a flashlight into the basement rafters was a search --By shining his flashlight into the rafters, the officer was clearly not exploring the basement for a shooting victim, but was searching for cocaine instead", emphasis supplied, slip op at 3). The court also held that this supposed "search" for cocaine (as opposed to the basement search for a possible shooting victim) could not be justified by exigent circumstances.

Petitioner agrees that the police properly observed the cocaine through the back door, properly entered the premises, and properly looked for shooting victims (including in the basement); however, petitioner disagrees that the discovery of the cocaine in the rafters was not appropriate under the plain view doctrine because not "inadvertent."

It must first be observed that the Michigan Court of Appeals was mistaken in its conclusion that the observation of the cocaine in the rafters was the result of a search, as made clear by Arizona v Hicks, 94 L Ed 2d 347 (1987). The Court there found a search had occurred (after an exigent circumstances entry to look for possible shooting victims or a shooting perpetrator) beyond that justified by the exigency because of the movement of stereo equipment, the Court expressly stating that looking at and recording serial numbers would not have been a search if no movement of the equipment to see the numbers would have been required. To see the cocaine here the officer was not required to move anything--he could see it in the rafters by looking. Just as the Court in Hicks stated that merely looking at serial numbers while looking for people is not a

search, looking in the rafters here (even with a flashlight) while looking for people was not a search either.

The Michigan Court of Appeals holdings requiring inadvertence also require review. First, it should be noted that the doctrine of inadvertence has never commanded a majority of this Court. See e.g. Texas v Brown;, 460 US 730, 103 S Ct 1535, 75 L Ed 2d 502 (1983). This Court has recently granted certiorari on the question of inadvertence and the plain view doctrine. Horton v California, 46 Cr L 3045 (10/2/89).

Further, even the plurality opinion of Justice Stewart in Coolidge v New Hampshire, 403 US 443, 91 S Ct 2022, 29 L Ed 2d 564 (1971) creating the doctrine establishes exceptions to it: "But to extend the scope of such an intrusion to the seizure of objects--not contraband nor stolen nor dangerous in

themselves--...." (emphasis added). In short, a legitimate entry will justify the seizure of contraband found in plain view even if the discovery of the contraband was not wholly inadvertent (assuming the inadvertence requirement truly exists). The instant case involving contraband, no inadvertence requirement applies.

Finally, many courts have held that "inadvertence" is not synonymous with "unexpected" or "unanticipated;" rather, the concern of the doctrine is that of a "planned warrantless seizure." See 2 LaFave, Search and Seizure, sec. 6.7(c), p.726, Coolidge, 29 L Ed 2d at 585, fn 26. As stated by Professor LaFave, "it would seem that under some circumstances a warrantless seizure of items in plain view is permissible notwithstanding the existence of probable cause as to the presence of those items prior to entry.

That is, a prior failure to obtain a search warrant is properly condemned only if the police had probable cause and the circumstances were such that it was feasible to obtain a warrant for entering the premises for some other purpose such as arrest." LaFave, at 725-726. Here the "other purpose" was exigent circumstances--to look for a possible shooting victim--which does not render awaiting a warrant "feasible." Further, this was not a "planned warrantless seizure" as discussed in Coolidge. The police were answering a shots fired radio run, and only became aware of the existence of the cocaine moments before entry into the premises to look for a shooting victim or victims. Given the observations at the back door, discovery of the cocaine may well not have been unanticipated or unexpected, but it was

inadvertent in the sense meant by Coolidge and its progeny.

Conclusion

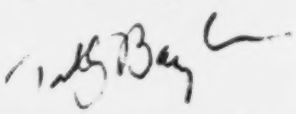
Because the entry into the house and its search for a possible shooting victim or victims was justified by exigent circumstances, because the discovery of the cocaine was not the result of a search, and because the seizure of the cocaine was consistent with the plain view doctrine, if properly interpreted, the Michigan Court of Appeals should be reversed. Because this Court has granted certiorari in Horton v California (a decision holding the contrary of the instant case), certiorari should be granted.

CONCLUSION

WHEREFORE, Petitioner requests that this Court grant plenary review, and, if the Court deems it appropriate, expedite scheduling for briefing so that the case may be argued in tandem with Horton v California.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



TIMOTHY A BAUGHMAN
Chief of Research,
Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

V June 15, 1989

TERRENCE ROSS MOORE

Defendant-Appellee.

Docket No. 106275

BEFORE: DOCTOROFF, P.J., AND MAHER AND REILLY, JJ.

APPENDIX A

PER CURIAM

Defendant was charged with possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401(2)(a)(i). Thereafter, the trial court granted defendant's motion to suppress the evidence of the cocaine seized from defendant's house. The prosecutor now appeals as of right. We affirm.

In the night of defendant's arrest, the Detroit Police Department broadcast a radio run indicating that gun shots had been heard inside a "known dope house." Nine police officers responded to the call. While some uniformed officers went to the front door of the house, three plainclothes officers moved to the back of the house to prevent the possible escape of any occupants. From their position immediately outside the back

door, the officers were able to see inside the house through a window. As the uniformed officers knocked on the front door, the three plainclothes officers witnessed defendant carry a package down the basement stairs. Based on their prior experience, the officers recognized the package as a kilo of cocaine wrapped for overseas shipment. After a short time, the defendant returned empty handed from the basement and went to answer the front door. The three plainclothes officers then returned to the front door of the house.

After answering the front door, defendant spoke with the uniformed officers and denied that anyone had been shot inside the house. Although defendant invited the police inside the house to determine whether there had been a shooting, defendant did not consent to a general search of the house. Once

inside the house, several officers began to search the main and second floors of the house. However, one of the plainclothes officers went directly into the basement. At the suppression hearing this officer testified that although his primary purpose for entering the basement was to search for possible shooting victims, he was also aware that the defendant had taken the suspected cocaine into the basement and he believed it was still there. Once in the basement, the officer shined his flashlight up toward the ceiling and noticed the suspected cocaine package lodged in the rafters. This package was seized, and the defendant was subsequently arrested.

Thereafter, on defendant's motion, the trial court concluded that the evidence of the cocaine must be suppressed. The trial court rejected arguments that the cocaine was found in plain view, during

an otherwise valid search for shooting victims, or that the offiers' conduct was justified by exigent circumstances. We agree.

We review a trial court's suppression ruling under the clearly erroneous standard. People v Russell, 174 Mich app 357, 361; __NW2d__(1988); People v Burrell, 417 Mich 439, 448; 339 NW2d 403 (1983). The ruling will be affirmed unless our review of the record engenders a firm and definite conviction that a mistake was made. Russell, supra. Further, we note that where a search is conducted without a warrant, the prosecutor has the burden of establishing that the search was justified. People v Wade, 157 Mich App 481, 485; 403 NW2d 578 (1987).

Under the "plain view" exception to the warrant requirement, a police officer may seize incriminatory evidence which he

observes in plain view from a position in which he has a right to be. Coolidge v New Hampshire, 403 US 443; 91 S Ct 2022, 2038; 29 L Ed 2d 564 (1971). However, the discovery of the evidence must be inadvertent. Coolidge, supra, at 91 S Ct 2040; People v US Currency, 148 Mich App 326, 329; 383 NW 2d 633 (1986). In the instant case, the discovery of the cocaine in the basement rafters was not inadvertent. Although the police were otherwise properly inside defendant's house to search for possible shooting victims, pursuant to defendant's consent, the officer who discovered the cocaine testified that he fully expected the cocaine to be in the basement, and that his decision to search the basement was at least partially motivated by a desire to locate the cocaine. By shining his flashlight into the rafters, the officer was clearly not exploring the basement

for a shooting victim, but was searching for cocaine instead.

Similarly, the basement search for the cocaine was not justified by exigent circumstances. Under this doctrine, otherwise unreasonable police conduct may be justified to (1) protect the police officers or other persons, (2) to prevent the loss or destruction of evidence, or (3) to prevent the escape of a witness. People v Preston Williams, 160 Mich App 656, 662, 408 NW2d 415 (1987). In the instant case, this doctrine justified the officers' presence at the back door of defendant's house since there was a real possibility that potential suspects might utilize that exist to flee. Consequently, the initial discovery of the cocaine, as defendant carried it into the basement, was also proper as it was observed in plain view. Coolidge, Supra. However, there were no existent

circumstances to justify the specific search for the cocaine without first obtaining a warrant. We note that the police had secured defendant's house shortly after their arrival and that all the occupants of the house had been detained in the living room. Thus, there was no reason to fear that the cocaine would be lost or destroyed before a search warrant could be obtained.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Richard M. Maher
/s/ Maureen Pulte Reilly

1. There was conflicting testimony presented at the suppression hearing as to whether the cocaine was immediately

seized or whether it was later seized after a search warrant was obtained. We note that the trial court's findings of fact were that the cocaine was seized prior to obtaining the search warrant.

APPENDIX B

ORDER OF THE MICHIGAN SUPREME COURT

ENTERED: December 28, 1989

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
Cross-Appellee

v

SC: 86687
COA: 106275
LC: 87-09597

TERRENCE R. MOORE
Defendant-Appellee.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The application for leave to appeals as cross-appellant is thereby rendered moot, and is denied.

BICKLEY AND GRIFFIN, JJ, would grant leave to appeal.

Boyle, J., dissents and states as follows:

I would grant leave to appeal to consider the scope of the search that might be authorized if exigent circumstances are found to exist in this case.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of an order entered at the direction of Court.

/s/Corbin Davis

Clerk